



# In the Supreme Court of the United States

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OCTOBER TERM 1944.

No. ....

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WILLIAM J. SOEDER and  
EDWARD A. SOEDER,

*Petitioners,*

vs.

THE UNITED STATES OF AMERICA,

*Respondent.*

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## BRIEF OF PETITIONERS

In Support of Petition for Writ of Certiorari.

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The Petitioners were convicted by a jury in the District Court of the United States at Cleveland, Ohio, and were each sentenced to serve a year and a day in a penal institution and to pay a fine of \$5,000.00. This conviction was affirmed by the United States Circuit Court of Appeals for the Sixth Circuit. The Judgment of the Circuit Court is hereto attached and marked "Appendix No. 1."

A summary of the matter involved is contained in the Petition for Writ of Certiorari, pages 3-6. The Indictment charged the Petitioners as officers of a Corporation with counselling, procuring and advising the preparation and presentation of a false and fraudulent return (Count one and Count three), and with attempting to defeat and evade the income and excess profits taxes (Count two and Count four), upon the net income of the alleged Corporation.

These Petitioners have denied that they diverted any funds from a corporation for fraudulent purposes and to defeat taxes. They stated that their business was owned

by them exclusively and that it was operated as a family affair; that they employed a public accountant and that this accountant had full charge of the books; that they were not a corporation and that no application for a charter was made by them for **The Soeder Sons Milk Company**, and that there was no franchise tax paid; no minute books; no board of directors; no stock certificates; that their auditor in 1935 advised the Internal Revenue Bureau that **The Soeder Sons Milk Company** was not a corporation and that he desired to file their income tax returns accordingly, but that the Bureau insisted that these returns be filed as **The Soeder Sons Milk Company, a Corporation**, on corporation forms and that is the reason why these returns were filed on corporation forms.

In their statements they stated that they frequently advanced monies as additional investment in their business and that they gave thousands of dollars as rebates to their customers in order to stay in business and compete with the other dairies which also gave rebates as per testimony in the record; that these rebates were given secretly because of the existence at that time of the Burk-Herner Act of the State of Ohio, which prohibited rebates and discounts. Because of that they did not put it on their books, but in order to balance their books for income tax purposes, they set up various amounts of receipts as credits to themselves and called them loans from themselves to the business, in order to off-set and reimburse themselves for this money expended in behalf of their business. The testimony showed that they advanced more than \$35,000.00 in rebates and that they expended more than \$43,000.00 in cash for other purposes and that this was their method of reimbursing themselves in order not to pay double income tax. The record shows that many of the customers testified of having received many thousands of dollars in cash rebates and that these customers entered said rebates on their books for income tax purposes. They contended that the manner of keeping their books balanced these accounts.

The Prosecution admitted that they knew that these rebates were given but that they did not give them any credit for it, because the tax payer did not enter these rebates on their books and further, that if the tax payer didn't take the trouble to enter them, they couldn't see the necessity for allowing it. This statement was made by the chief government investigator, though he admitted he examined these customers' books for other purposes in connection with this investigation.

Because of that, counsel for these Petitioners requested Special Instructions in the Charge, being identified as "Assignments of Error No. 20 and No. 21," which are as follows:

#### **ASSIGNMENT OF ERROR NO. 20.**

"The Court further instructs the Jury as a matter of law, a taxpayer is entitled to deduct from his income taxes and is to be given credit for all the necessary and ordinary expenses paid or incurred during the taxable year in carrying on any trade or business including rebates or discounts on merchandise actually sold. Therefore if you find from the evidence that these defendants gave rebates and discounts on merchandise actually sold by them and if you further find that such rebates and discounts were ordinary and necessary expenses paid or incurred during the taxable year, then you must find that these rebates and discounts were deductible items and that the defendants had a right to deduct said rebates and discounts from the income tax returns and you must in your computations of income tax liability if any, take into consideration and give due credit and allowances for all such rebates and discounts. And I further charge you that you should give full credit and allowance for such rebates and discounts even though none of such rebates and discounts appear on the books of the corporation and even though said rebates and discounts were given, if you find that they were so given, during the time of the existence of the Burke Act."

and the Court's refusal to so charge or give his own charge on rebates probably constituted reversible error.

#### ASSIGNMENT OF ERROR NO. 21.

"The Court further instructs you that if you find that these defendants gave rebates and discounts and if you further find that said rebates and discounts were an ordinary and necessary expense and if you further find that said rebates and discounts were otherwise proper deductions for the years in question, the fact that at that time, 1933 to 1935, there was a State law known as the Burke Act prohibiting the giving of rebates should not enter into your deliberations in computing any tax wilfully evaded if you find any such evasion of tax and you must not take the existence of that law into account in the deciding and allowing of any of these deductions if you find them otherwise allowable and deductible. In other words the existence of the Burke Act has in itself no bearing on the deductibility of the rebates and discounts in question."

and the Court's refusal to so charge or give his own charge on rebates probably constituted reversible error.

In this connection there is testimony that these rebates were necessary in order to protect the interests of **The Soeder Sons Milk Company**, to keep it alive and as a going business. Because of that such rebates became an ordinary and necessary expense and deductible as such.

As we stated before, the question of rebates is so bound up with the question of fraud that it constitutes the most important legal question here. The Government counsel cited several cases in his Brief that such rebates are not deductible, principally because they were given secretly and in violation of a state statute, and were, therefore, paid contrary to "public policy," and he goes on to say, in his brief, that the holding of the Courts on illegal expenditures are such that they would not be permitted to be deductible as "ordinary and necessary business expenses."

We believe that the Court's failure to charge on this important question of rebates constitutes prejudicial and reversible error and we believe the Government counsel's contentions in his argument and brief that such rebates were not deductible because of being contrary to "public policy" is also untenable.

It is our contention that in the latest case decided by the United States Supreme Court, being the case of *Heininger vs. Commissioner*, in volume 64, Supreme Court Reporter (advance sheets No. 4), sustaining the Court of Appeals, the Court says:

"Upon being served with notice of the proposed Fraud Order, Respondent was confronted with a new business problem which involved far more than the right to continue using his old advertisements. He was placed in a position in which not only his selling methods, but also the continued existence of his lawful business were threatened with complete destruction.

"So far as appears from the record, Respondent did not believe, nor under our system of jurisprudence, was he bound to believe, that a Fraud Order destroying his business was justified by the facts or the law. Therefore, he did not voluntarily appeal the business, but defended it by all available legal means.

"To say that this course of conduct and the expenses which it involved were extraordinary or unnecessary, would be to ignore the ways of conduct and the forms of speech prevailing in the business world" \* \* \* "it has never been thought, however, that the mere fact that an expenditure bears a remote relation to an illegal act makes it nondeductible. The language of section 23 (A) contains no express reference to the lawful or unlawful character of the business expenses which are declared to be deductible \* \* \*.

"However, as we have pointed out above, the Board of Tax Appeals here denied the claimed deduction not by an independent exercise of judgment, but upon a mistaken conviction that denial was required as a matter of law.

"We, therefore, affirm the judgment of the Circuit Court of Appeals, reversing and remanding the cause to the Board of Appeals."

**On the question of corporate existence:**

The evidence showed that there was no charter; no application for a charter which, of course, means that it could not be a corporation *de jure*. Then to become a corporation *de facto* it is necessary that an attempt to organize under the law must have been made and that during the time mentioned in this case, the State of Ohio must recognize the existence of a corporation either by assessment of franchise tax or otherwise. It goes without saying that the mere using of a name of a corporation is not sufficient.

The only resemblance of **The Soeder Sons Milk Company** to a corporation is the fact that their returns were filed on corporation forms. This is explained in the testimony of their Auditor when he testified that he notified the Internal Revenue office at Cleveland that the business is not incorporated, but they insisted that he file as a corporation. But we submit to the Court that the mere act of filing returns on corporation forms, or the absence of the usual terminology of corporations cannot be called decisive.

Testimony that the concern did business "as a corporation" is also insufficient to establish corporate existence and proof that a concern did business under a corporation name does not show a corporate existence since that fact is consistent with the existence of a partnership.

In the case of *Harrill vs. Davis*, 168 Federal, 187, the Court holds that:

"Individuals cannot acquire any corporate existence whatever, either *de jure* or *de facto*, by merely adopting a name importing a corporation, and assuming to be and to act as a corporation without color of any lawful authority. Mere user alone is not sufficient."

On the question of an association taxable as a corporation, the record is barren of any features that could place **The Soeder Sons Milk Company** in that class. The Supreme Court has recognized five salient features of a corporation:

1. Title to the property held by the entity.
2. Centralized management.
3. Continuity uninterrupted by deaths.
4. Transfer of interest without affecting continuity.
5. Limitation of personal liability of the participants.

None of the above features can be found in the case at bar.

In the case of *Morrissey vs. Commissioner*, 296 U. S. 344, the Supreme Court held:

“It has been said that no inelastic rule can be advanced to settle the question, due to the variety of circumstances under which it may arise, but that the facts of each case must control its determination.”

We find two legal questions of importance in this case. First, whether the Court of Appeals was right in affirming the right of the Trial Judge to charge the jury that **The Soeder Sons Milk Company** was a corporation as a matter of law, and his refusal to submit the question to the jury as a question of fact in this case as per special exception to the charge to the jury. Second, if the Court did have the right to charge the jury in that manner, was there sufficient evidence before the Court to warrant the Appellate Court's finding that the Prosecution established a *de facto* corporation or association under the Internal Revenue Statute.

Our answer to the first question is that we believe the question of corporate existence in this case should have been established by the prosecution when it rested its case and having failed to do so, the motion to direct a verdict,



as identified by the following Assignments of Error, should have been granted.

#### **ASSIGNMENT OF ERROR NO. 1.**

The Court erred in denying the motion made on behalf of defendants, at the end of the government's case, to dismiss the indictment on the ground that the evidence was insufficient as a matter of law to sustain any count in the indictment, particularly in the government's failure to offer proof that the Soeder Sons Milk Co. was a "corporation duly organized and existing under the laws of the State of Ohio," as alleged in the indictment. To which ruling of the Court counsel there and then took exception.

The appellants' contention throughout the case is that in this case, the legal existence of the corporation is an essential element of the crime charged and must be proven by the prosecution.

#### **ASSIGNMENT OF ERROR NO. 2.**

The Court erred in granting leave to the prosecution to reopen the case for the purpose of offering in evidence government exhibit No. 65, which was an exemplified document or certified copy of a charter styled The Soeder Sons Company, which charter was cancelled by the state in 1926. To which ruling of the Court, and to the introduction of such document, counsel there and then took exception. The grounds for the objection are that the name The Soeder Sons Company indicates a different organization, and its charter expired in 1926, whereas the indictment charges that The Soeder Sons Milk Company was a corporation duly organized and existing under the laws of the State of Ohio during the years 1934, 1935, 1936 and 1937. Counsel also claimed that such evidence would only tend to confuse the jury.

**ASSIGNMENT OF ERROR NO. 3.**

The Court erred in denying the motion made on behalf of the defendants at the end of the case, a pertinent part of which is as follows:

"I move at this time that the Court take the case from the jury and direct a verdict in favor of the defendants because not only has the government failed to prove the existence of a corporation duly organized under the laws of the State of Ohio, but the defense has now proved that there is no such corporation and never was, and the allegation 'a corporation duly organized and existing under and by virtue of the laws of the State of Ohio' is a material and important allegation in this indictment."

In its ruling on this motion, the Court stated:

"I believe I have heard all I want to. I understand your position clearly. I stated to you at the end of the government's case, and I will re-state it, the Court is going to charge this jury that for the purpose of the Internal Revenue Laws under which this indictment is drawn, the Soeder Sons Milk Company was required to make a return as a corporation for the calendar years of 1936 and 1937, and that is the Court's view of the law, and that is what the Court is going to charge the jury, and that will be their starting point. It is not going to be submitted to the jury as a question of fact for their decision. Your motion is overruled."

To all of which counsel took an exception.

**ASSIGNMENT OF ERROR NO. 15.**

The Court erred in its charge to the jury in the following language:

"For the purpose of the Revenue Act, under which this indictment has been returned, I charge you as a matter of law, that the Soeder Sons Milk Company was a corporation during the period covered by this indictment, and that the Soeder Sons Milk Company was required to make a true return of its income, if any, as a corporation, and was required to pay an in-

come tax, if any, in fact, was due, as a corporation. The Soeder Sons Milk Company has been required, under the law, to file a corporation income and excess profits tax return for the calendar years of 1936 and 1937, on or before March 15th, 1937 and 1938 respectively."

### ASSIGNMENT OF ERROR NO. 23.

We believe Defense was entitled to the following requested charge No. 11—Assignment of Error 23 (R. 54, Vol. I)—in view of the charge in the indictment and the failure to prove the corporate existence:

"The government claims that these defendants attempted to defeat the tax of a corporation, The Soeder Sons Milk Company, by preparing and presenting a false income tax return for the year 1936 to 1937. It is the duty of the government to prove every material fact charged in the indictment. I therefore charge you that it becomes the duty of the government to affirmatively establish that there was such a corporation, The Soeder Sons Milk Co., upon which such tax could fall. Therefore if you find from the evidence that the government failed to affirmatively establish the existence of a corporation, the Soeder Sons Milk Co. as named in the indictment, then you must find the defendants not guilty as charged in the indictment."

When the Court permitted the reopening of the case and admitted into the evidence the copy of cancelled charter for a corporation styled *The Soeder Sons Company*, it certainly created a question of fact for a jury to decide whether the charter of *The Soeder Sons Company*, cancelled sixteen years before this indictment, is the same as **The Soeder Sons Milk Company** named in the indictment. This added to other uncertainties in the case and to the effect or weight of evidence, and we believe is in line with the following holding in the case of *Gunning v. Cooley*, 281 U. S. 90:

“Where uncertainty arises from a conflict in the testimony \* \* \* the question is not one of law but of fact to be settled by the jury.”

Our answer to the second question is that the Prosecution failed to establish *de facto* existence in the following respects:

There are two requisites for a *de facto* corporation. (1) It must appear to be acting under color of law. (2) It must be recognized by the State as such.

This is the holding in the case of *Tulare Irrigation District v. Shepard*, 185 U. S. 1:

“In proceedings where the question whether a corporation exists or not arises collaterally, the Courts will not permit its corporate character to be questioned, if it appears to be acting under color of law, and recognized by the State as such.”

In the case at bar the State of Ohio did not recognize **The Soeder Sons Milk Company** as a corporation, because it refused to accept franchise taxes and returned the check with a statement to that effect. Therefore, one of the requisites of the existence of a corporation is lacking and we, therefore, believe the Court of Appeals was in error.

WHEREFORE, it is respectfully prayed that the Petition herein be granted.

Respectfully submitted,

HENRY LAVINE,

H. W. KISER,

*Counsel for Petitioners.*